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Corinna Barrett Lain

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PASSIVE-AGGRESSIVE EXECUTIVE POWER

CORINNA BARRETT LAIN*

My contribution to the 2013 Constitutional Law Schmooze poses a question about the downside of executive power, at least in the enforcement context. If executive power to enforce the law presupposes the duty to use it,¹ what happens when the executive branch would rather not?

Perhaps reframing the question will help. What do the death penalty, driving violations, drugs, deportation, and the Defense of Marriage Act (“DOMA”)² have in common, besides the letter “d”? The answer is passive-aggressive executive power, and in the brief discussion that follows, I use these five factual contexts to illustrate five variations of what I mean.

When those charged with enforcing the law would prefer not to, what they do is not so different from what the rest of us do when pushed. At least five passive-aggressive responses easily come to mind—and at the outset, I set aside the “Just say no” response, which is an exercise of executive power but is not in the passive-aggressive category (because it is just plain aggressive).³ Here are the five responses: (1) do nothing, and hope nobody notices; (2) do something silly, and make a mockery of the whole enterprise; (3) say that you *would* do something, but you are too busy; (4) say that you *would* do something, but you are not competent; and

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* Professor of Law and Associate Dean for Faculty Development, University of Richmond School of Law. Special thanks to Kevin Walsh and Wendy Perdue for schmoozing with me about the Schmooze, Jim Gibson for comments on a previous draft, and Christina Crawford for her excellent research assistance.

1. See U.S. CONST. art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed . . .”).

2. Defense of Marriage Act, Pub.L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. §§ 7 and 28 U.S.C. § 1738C (1996)).

3. See J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION 54 (1971) (“Eisenhower’s policy seemed to have been: ‘Thurgood Marshall got his decision, now let him enforce it.’”); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 131 (1994) (“Moreover, in 1956 Eisenhower on more than one occasion refused to involve the federal government when mob protests and state obstructionism blocked the implementation of school desegregation orders.”); see also ROBERT V. REMINI, THE LIFE OF ANDREW JACKSON 216 (1988) (discussing President Jackson’s famous, but perhaps historically inaccurate, quote in the wake of the Supreme Court’s ruling in *Worcester v. Georgia*, 31 U.S. 515 (1832), “John Marshall has made his decision; now let him enforce it!”).

(5) say, in a moment of rare clarity and self-awareness, “*Fine, I’ll do it, but let’s just be clear—I don’t want to.*”⁴

In the discussion that follows, I first flush out these responses with my five examples—the death penalty, driving violations, drugs, deportation, and DOMA. I then offer some normative thoughts about each of these responses using the standard of a reasonably prudent thirteen-year-old⁵ and parallel institutional considerations in the realm of executive power.

I. SAMPLING PASSIVE-AGGRESSIVE EXECUTIVE POWER

A. *The Death Penalty*

In states that have the death penalty, the governor typically stands as the last stop between a condemned inmate and his or her death.⁶ In most states, this last stop takes the form of a clemency petition from the condemned inmate, but in some states, it takes the form of an application by the state for a death warrant instead.⁷ Either way, the state governor makes the call, wielding executive power to prevent executions (by commuting them to life sentences, granting pardons, and the like) or to order that executions be carried out (by issuing death warrants, denying clemency petitions, and the like). The point is that state governors have to go one way or the other. When petitions are on their desk, they have to decide—or do they?

Consider Florida’s death penalty in 2011⁸—a great example of the “do nothing, and hope nobody notices” strand of passive-aggressive executive power. Florida has the second largest death row in the nation, with over four hundred condemned inmates awaiting execution.⁹ In April 2011, forty-seven of those inmates—slightly over ten percent—had exhausted all

4. This response is sometimes followed by “*and I think it’s unfair.*”

5. I credit Julia Rose Lain for inspiring the analogy of a reasonably prudent 13-year-old, with thanks for refraining from many of the passive-aggressive responses I discuss in this essay.

6. This assumes that all judicial remedies have been exhausted. By governor, I mean governor or clemency board, also a part of the state executive branch.

7. In Florida, New Hampshire, and Pennsylvania, the governor must sign a death warrant to commence an execution. See FLA. STAT. ANN. § 922.052; N.H. REV. STATE. ANN. § 630:5; *Pennsylvania Readies First Non-Volunteer Execution Since 1978, Defendant Killed Sexual Abusers*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/pennsylvania-readies-first-non-volunteer-execution-1978-defendant-killed-sexual-abusers> (last visited Sept. 24, 2013).

8. FLA. STAT. ANN. § 922.052 (effective July 4, 2000 through June 30, 2013).

9. See *Death Row Inmates by State*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year> (last visited Sept. 24, 2013) (showing 413 death row inmates in Florida as of January 1, 2013, compared to California’s 727 death row inmates).

appeals and were waiting for just one thing: the governor's signature on their death warrant.¹⁰ Nearly twenty of Florida's death row inmates have been awaiting execution for at least thirty years.¹¹

What's the hitch? Florida Governor Rick Scott had just started his term in January 2011,¹² so although the press faulted him for the backlog,¹³ he had little to do with it (as he has subsequently made clear by signing at least six death warrants since 2011).¹⁴ But Governor Charlie Crist, who preceded Governor Scott, had signed just six death warrants during his entire four-year term—a marked difference from the twenty-four death warrants that Governor Jeb Bush signed during his tenure as governor.¹⁵ Indeed, under Governor Crist, more people on Florida's death row died of natural causes than died of executions—around three times as many.¹⁶

Why did Crist not sign more warrants? The short answer (and key point, for the purposes of this discussion) is that he did not want to, but for those who want the longer version, a number of explanations come to mind. One blogger writing about Florida's lag time on death row surmised, "Crist was running for U.S. Senate and didn't want bad publicity in the press like Texas Governor Perry receives."¹⁷ Other explanations may have been in

10. See Aaron Sharockman, *Some 40 Death Row Inmates Awaiting Death Warrant from Governor, Democrat Claims*, POLITIFACT.COM (Apr. 20, 2011, 10:05 AM), <http://www.politifact.com/florida/statements/2011/apr/20/geraldine-thompson/some-40-death-row-inmates-awaiting-death-warrant-g/>.

11. See Douglas A. Berman, *Just Why Are the "Waits" on Florida's Death Row So Long?*, SENT'G L. & POL'Y BLOG (Feb. 13, 2012, 11:42 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2012/02/just-why-are-the-waits-on-floridas-death-row-so-long.html (noting that nineteen people on Florida's death row had been waiting for execution longer than thirty-one years); Sharockman, *supra* note 10 (discussing the case of sixty-four-year-old death row inmate Gary Alvord, who had been awaiting execution for thirty-seven years).

12. See *List of Florida State Governors*, THEUS50, <http://www.theus50.com/florida/governors.php>.

13. See Sharockman, *supra* note 10 (noting that, as of April 2011, Governor Scott "ha[d] yet to sign a death warrant since taking office").

14. *Id.*; *Supreme Court Denies Last Appeal by Manuel Pardo. Cop Turned Executioner Scheduled to Die Dec. 11*, FLAGLERLIVE.COM (Dec. 6, 2012), <http://flaglerlive.com/46202/manuel-pardo-execution/>; *Scott Signs Death Warrant in the Killing of a Florida State Trooper*, THELEDGER.COM, Jan. 19, 2013, <http://www.theledger.com/article/20130119/NEWS/130119263>.

15. Sharockman, *supra* note 10. In fairness, Governor Jeb Bush served for two terms, so those twenty-four warrants were signed over eight years, not four. See *Jeb Bush*, BIO, <http://www.biography.com/people/jeb-bush-201294> (last visited Sept. 25, 2013). Still, Governor Bush's rate was twice that of Governor Crist's rate (whether that is a good thing or bad is a different question). See Sharockman, *supra* note 10.

16. See Berman, *supra* note 11 (noting that only five people were actually executed under Governor Crist, while fifteen died of natural causes).

17. See *id.* (describing the effect of bad publicity on political aspirations).

play as well. The phenomenon of death row exonerations may have made Crist nervous; with twenty-four on record, Florida has the dubious distinction of having more exonerations than any other state.¹⁸ The prospect of triggering another round of post-conviction challenges might have curbed his enthusiasm too.¹⁹ It is also possible that the so-called “Marshall Hypothesis”²⁰ was at work—as empirical evidence has shown, the more people know about the death penalty, the less they like it and more disturbing it becomes.²¹

But who wanted to rush those executions anyway? Not the inmates who were the subject of the pending death warrants, or the correctional officers responsible for carrying them out.²² One blogger questioned “whether anyone really cares all that much about how slow this march has come to be,”²³ and the point is a valid one. I am guessing victims care (at least some of them), and perhaps state attorneys general care too. But there is no deadline for these sorts of petitions, and the process is notoriously secretive, so there is only so much anyone can do.²⁴ That is why Florida’s death penalty under Governor Crist is a nice example of the “do nothing and hope nobody notices” strand of passive-aggressive executive power.

Outside Florida, it is hard to say how many governors are taking a passive-aggressive approach to executions in their state. Clearly not in this category is the governor of Texas, who has had no problem executing the

18. See *Innocence and the Death Penalty*, DEATH PENALTY INFO. CTR. (Feb. 11, 2013), <http://www.deathpenaltyinfo.org/innocence-and-death-penalty#inn-st> (listing Florida’s death row exonerations as of December 26, 2012).

19. See Berman, *supra* note 11 (“[Attorneys] file whatever they can for as long as they can to keep their cases alive in the courts. New issues based on recent court rulings and changes in the law provide new fodder for appeals all the time . . .”).

20. See *Furman v. Georgia*, 408 U.S. 238, 370 (1972) (Marshall, J., concurring) (“Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice.”).

21. See, e.g., Austin Sarat and Neil Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171 (demonstrating empirical research in support of the Marshall Hypothesis).

22. See, e.g., *Law Enforcement Endorsements*, SAFE CALIFORNIA, <http://www.safecalifornia.org/about/law-enforcement-endorsements> (last visited Sept. 26, 2013) (indicating one-hundred-fifty law enforcement endorsements to abolish the death penalty in California, including twenty-four correctional, parole, and probation officers).

23. Berman, *supra* note 11.

24. See Sarah Lundy, *Only Florida’s Governors Can Say How They Pick Execution Order*, ORLANDO SENTINEL, May 19, 2009, <http://www.fadp.org/news/2009052003/> (discussing secrecy and lack of accountability in death warrant process).

law (or people).²⁵ Also not in this category is Oregon's governor, who, on the other side of the spectrum, has had no problem publicly denouncing the death penalty in his state and issuing reprieves.²⁶ (Indeed, the latest from Oregon is a lawsuit over whether death row inmates can refuse to accept them.)²⁷ But California may be in this category, as well as other nonexecuting states with people lingering on death row.²⁸

California has the largest death row in the country, with over seven hundred death row inmates awaiting execution.²⁹ Like Florida, more of California's death row inmates are dying from other causes than from executions.³⁰ Of the ninety-eight people who have died on California's death row in the modern death penalty era, thirteen died by execution, fifty-eight by natural causes, twenty-two by suicide, and six by causes categorized as "other."³¹ Although challenges to California's lethal

25. With 502 executions since 1976, Texas is the clear leader among the states; Virginia is second highest with 110 executions. *See Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> (last visited July 26, 2013).

26. Oregon's governor is an example of the Marshall Hypothesis in action. *See supra* notes 20–21 and accompanying text (explaining Marshall Hypothesis). Apparently, Governor John Kitzhaber was "haunted" by two executions during his first term of office, leading him to believe that Oregon's death penalty is "compromised and inequitable." *Oregon Death Row Inmate Fighting Reprieve From Governor*, FOXNEWS.COM, July 24, 2012, <http://www.foxnews.com/us/2012/07/24/oregon-death-row-inmate-fighting-reprieve-from-governor/print> [hereinafter *Oregon Death Row Inmate*].

27. *See Oregon Death Row Inmate, supra* note 26. The death row inmate claimed that "[a] reprieve is not effective until accepted by the recipient" and that he wanted "to speed his punishment in protest of a criminal justice system that he says is broken." *Id.* In the end, the judge ruled that the inmate had a right to reject the reprieve, while noting he agreed "with many of the concerns expressed by the governor." Lynne Terry, *Gary Haugen Can Reject Gov. Kitzhaber's Reprieve, Judge Rules*, OREGONIAN, Aug. 3, 2012, http://www.oregonlive.com/pacific-northwest-news/index.ssf/2012/08/gary_haugen_can_reject_gov_kit.html.

28. *See Jurisdictions with No Recent Executions*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/jurisdictions-no-recent-executions> (last visited July 26, 2013) (showing twenty-six jurisdictions with no executions in the last ten years and thirty-three jurisdictions with no executions in the last five years). It is important to note, however, that death row inmates may not be executed for a number of reasons, including mental health issues and new legal challenges based on changes in the law. *See supra* notes 18–21 and accompanying text.

29. *See Death Row Inmates by State, supra* note 9 (noting California's 727 inmates on death row).

30. *Compare Jurisdictions with No Recent Executions, supra* note 28, with *Death Row Inmates by State, supra* note 9.

31. *See Condemned Inmates Who Have Died Since 1978*, CALIFORNIA DEP'T OF CORRECTIONS AND REHABILITATION, http://www.cdcr.ca.gov/Capital_Punishment/docs/

injection protocol almost certainly account for the state's lack of executions over the last several years,³² they do not account for the state's lack of executions over the previous twenty.

What we are seeing is the same basic phenomenon that Mark Graber wrote about in his path-breaking work on legislative deferrals.³³ When legislators find it too costly to take a stand one way or the other, the stand they most prefer to take is no stand at all.³⁴ Similarly, when chief executives do not want to say "yes" to executions, but cannot afford to say "no," they do nothing and hope nobody notices. It is the same basic response, but it is not legislative deferral—it is passive-aggressive executive power.

B. Driving Violations

The example of driving violations is a tad off-point because it concerns a state's passive-aggressive enforcement of a federal mandate, and thus is not purely an exercise of executive power (although executive power is a part of it). But here is another beautiful example of a passive-aggressive response to enforcement obligations, and it comes from personal experience so I had to use it. Besides, this one is just quirky enough to be the sort of conversation starter one would hope for at an event called the "Schmooze."

When I was a kid growing up in Montana, my Dad used to put five-dollar bills in the glove compartment box of our car. I did not think about what that money was for, but when I became a teenager and had my driver license, I figured it out pretty quickly: it was to pay speeding tickets that during the daytime amounted to an on-the-spot five-dollar fine. Crazy, right? Here is the backstory.

Before 1974, and for a brief period of time after 1995,³⁵ Montana's highway speed limit signs looked like this:

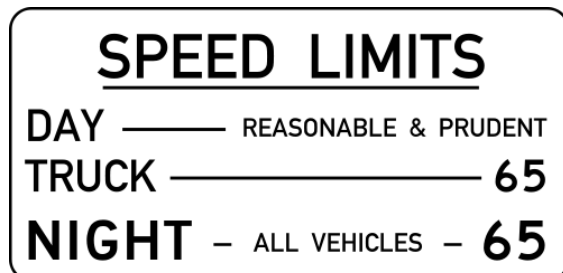
CONDEMNEDINMATESWHOHAVEDIEDSINCE1978.pdf (last visited Apr. 15, 2013). I presume that "other" includes various forms of homicide, such as being "shot on [detention facility] Exercise Yard." *Id.*

32. For a discussion of California's problems with lethal injection over the last several years, see Corinna Barrett Lain, *The Virtues of Thinking Small*, 67 MIAAMI L. REV. 397, 405 (2013).

33. See generally Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 36 (1993) (discussing the inaccurate understandings of the relationship between independent judicial policymaking and the judiciary system).

34. *Id.* at 53–61.

35. In 1998, the Montana Supreme Court struck down the state's "reasonable and prudent" speed limit as too vague to give drivers notice as to what was prohibited, violating the state's due process clause. See *Montana v. Stanko*, 974 P.2d 1132, 1138 (Mont. 1998). As one Montanan



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Outsiders called our roads the “Montanabahn,”³⁷ but those of us who lived there knew it was mostly a matter of necessity—there were so many miles to cover, and so few cars, that most of the time it just did not make sense to drive slower than 80 to 90 miles per hour (“MPH”) on the highway.³⁸

Then the energy crisis hit, and in 1974, Congress passed the National Maximum Speed Law (“NMSL”), imposing a limit of 55 MPH across the country as a fuel conservation measure.³⁹ (The national speed limit was later raised to 65 MPH, and then repealed entirely in 1995.⁴⁰) To coerce

tells it, “The case was brought by a plaintiff named Rudy Stanko, who was a well-known ‘Freeman’ white-supremacist nut-job who was a perennial recreational litigant who finally hit a winner challenging the speed law.” *Montana Speeding Tickets: Did They Used to Have a Flat \$5 Rate and When Did It Change?*, STRAIGHT DOPE (Apr. 20, 2008, 5:00 PM), <http://boards.straightdope.com/sdmb/showthread.php?t=464693> [hereinafter *Montana Speeding Tickets*]. In 1999, the legislature set the speed limit at 65 MPH. It was later bumped to the current 75 MPH on interstates, 65 MPH on secondary roads. *Montana Speed Limits*, MDT, available at http://www.mdt.mt.gov/travinfo/speed_limit.shtml.

36. *Reasonable and Prudent* . . . , MONTANA DAILY (Jan. 26, 2011, 8:00 AM), http://www.dailymontana.com/2011_01_01_archive.html.

37. *Montana Speed*, U.S. HIGHWAYS, <http://www.us-highways.com/montana/mtspeed.htm> (last visited Sept. 30, 2013) (discussing Montana’s reputation amongst speed enthusiasts as the “Montanabahn”).

38. See Timothy Egan, *Speeding Is Easy (and Almost Free) in Montana*, N.Y. TIMES, July 10, 1989, <http://www.nytimes.com/1989/07/10/us/speeding-is-easy-and-almost-free-in-montana.html> (“Trying to drive the speed limit here in the Big Sky State is like trying to eat nothing but bread crusts at a banquet. There is just so much road and so few cars, that the temptation to put the pedal to the metal is overwhelming.”). See also *infra* note 44.

39. Emergency Highway Energy Conservation Act, Pub. L. No. 93-239, 87 Stat. 1046 (1974) (codified in part at 23 U.S.C. § 658).

40. Surface Transportation and Uniform Relocation Assistance Act, Pub. L. No. 100-17, 101 Stat. 132 (1987) (raising speed limit on rural interstate highways to 65 MPH); National Highway

compliance, the NMSL threatened to withhold federal transportation dollars from states that did not play along.⁴¹ Montana played, but like other states, was not at all happy about it (remember that Sammy Hagar song, “I can’t drive 55!”?).⁴² “The only reason we’ve got any speed limit at all is Federal blackmail, pure and simple,” one Montanan told the press.⁴³ Anyone who was anyone in Montana at the time knew about the NMSL—and hated it.⁴⁴

So what did Montana do? It did something silly, making a mockery of the entire enterprise. The whole point of the federal speed limit was energy conservation, so Montana decided to enforce the law with a five-dollar on-the-spot fine for “waste of a natural resource.”⁴⁵ Violations of the law did not go on a person’s driving record and could not be used to raise insurance rates.⁴⁶ And because there was little point in issuing such tickets—it often took more gas to catch up with a speeding motorist than the ticket was worth—state troopers often did not write them (although I paid one, once).⁴⁷

Designation Act of 1995, Pub. L. No. 104-59, 109 Stat. 568 (granting all speed limit control to the states).

41. See U.S. DEP’T OF TRANSPORTATION, A CHRONOLOGY OF DATES SIGNIFICANT IN THE BACKGROUND, HISTORY AND DEVELOPMENT OF THE DEPARTMENT OF TRANSPORTATION, <http://ntl.bts.gov/historian/chronology.htm> (last visited July 26, 2013) (“The act required that the Department [of Transportation] approve no highway projects for states having a maximum speed limit greater than 55 MPH.”); see also Egan, *supra* note 38 (“Only after Federal officials threatened to withhold highway funds did the state enact the \$5 speeding ticket.”).

42. For those who, sadly, are too young to have any idea what I am talking about, see Sammy Hagar Vevo, *Sammy Hagar—I Can’t Drive 55*, YOUTUBE (Feb. 3, 2010), http://www.youtube.com/watch?v=RvV3nn_de2k.

43. Egan, *supra* note 38.

44. One blogger writes,

The speed limit was treated with complete derision for a couple of reasons. First, expecting people to drive 55 on most of the state highways and interstates in Montana is a joke. These [roads] are mostly wide open, light traffic roads, and distances between towns is relatively far as compared to smaller states. NOBODY drives 55. Second, and more to the point, Montana has a bit of the ‘Live Free Or Die’ spirit (with apologies for stealing the motto of New Hampshire) and there was a lot of resentment that the Feds would strong-arm the state into passing a law that was (a) unnecessary and (b) unwanted.

Montana Speeding Tickets, *supra* note 35; see also Egan, *supra* note 38 (“Few laws have ever been so despised . . .”).

45. See Egan, *supra* note 38 (“Officially, a \$5 speeding ticket for violating the speed limit on Montana highways is not a moving violation, but ‘an unnecessary waste of a natural resource,’ gasoline. Moreover, the ticket cannot be cited to increase insurance rates for motorists or become part of the permanent driving record.”).

46. *Id.*

47. *Id.* (“Under this system, the state of Montana loses \$22 in labor and processing costs for every ticket written by a state trooper, a recent study by a legislative committee found . . .” One

What Montana effectively said to the federal government with its five-dollar on-the-spot penalty was, “*Fine, we’ll enforce your silly law because we have to, but we’re not going to act like we mean it because we don’t. Read between the lines, here is what we think of your law.*” The federal government gave Montana a silly law, and Montana gave the federal government silly enforcement, making a mockery of the entire enterprise. That is why Montana’s enforcement of the NMSL is a nice example of the “do something silly” genre of passive-aggressive executive power.

C. Drugs (Specifically, Marijuana)

Under the Controlled Substances Act (“CSA”),⁴⁸ marijuana is categorized as a Schedule 1 drug (along with heroin and LSD) known for having a high potential for abuse and “no currently accepted medical use in treatment in the United States.”⁴⁹ As such, its cultivation, distribution, and possession are criminally punishable under federal law.⁵⁰

Enter the states. Eighteen of them, as well as the District of Columbia, have decriminalized medical marijuana, which is marijuana purchased pursuant to a valid prescription and used for medicinal purposes.⁵¹ Another two states, Washington and Colorado, have now legalized the drug entirely in small amounts for recreational use.⁵²

Set aside the instinct to say that preemption doctrine resolves the conflict. For complicated reasons that go beyond the scope of this Article, courts are not finding preemption.⁵³ In practice, that means there are licensed businesses that are perfectly legitimate (and paying taxes) in

officer said, “See, I can sit here and write every car that goes by. One day I wrote 63 tickets. But with the Tinkertoy engine I’ve got in this car, it takes me five minutes just to catch up with the guy, and then I write a five-buck ticket. Is that worth it?”).

48. 21 U.S.C. §§ 801 (2012).

49. 21 U.S.C. § 812(b)(1) (2012).

50. Mere possession is a misdemeanor punishable by up to a year in prison and a minimum fine of \$1,000. See 21 U.S.C. § 844(a) (2012). The cultivation and distribution of marijuana generally constitute felonies punishable by up to five years in prison and a maximum fine of \$250,000. 21 U.S.C. § 841(b) (2012).

51. See TODD GARVEY, MEDICAL MARIJUANA: THE SUPREMACY CLAUSE, FEDERALISM, AND THE INTERPLAY BETWEEN STATE AND FEDERAL LAWS, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, 4 (Nov. 9, 2012), available at <http://www.fas.org/sgp/crs/misc/R42398.pdf>.

52. *Id.* at 4 n.22. Both states have decriminalized the possession of small amounts of marijuana (typically less than an ounce). *Id.*

53. See *id.* at 7–14 (discussing the extent federal law preempts state medical marijuana laws). In *Gonzales v. Raich*, 545 U.S. 1 (2005), the Supreme Court upheld Congress’s power to pass the CSA, but did not address the preemption question that obviously followed. *Id.* at 5–6.

twenty or so states, but that nevertheless are violating federal law. What result?

The answer has changed over time, so for the purposes of this discussion, I go back to 2008 and 2009. In 2008, then-Senator Barack Obama was running for his first term as President. When asked about his position on medical marijuana, he replied, “I’m not going to be using Justice Department resources to try to circumvent state laws on this issue.”⁵⁴ White House drug czar Gil Kerlikowske followed with the sound bite, “We’re not at war with people in this country”⁵⁵—and he was on to something. Public opinion polls show that over seventy percent of those asked support the use of marijuana for medical purposes if prescribed by a doctor.⁵⁶

Once in office, President Obama’s Department of Justice (“DOJ”) put its money where his mouth was. In 2009, then-Deputy Attorney General David Ogden sent a memo to U.S. attorneys in states that authorized medical marijuana.⁵⁷ Focusing on the “efficient and rational use of [DOJ’s] limited investigative and prosecutorial resources,” the memo told prosecutors that they “should not focus federal resources in [their] States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”⁵⁸ In a statement attached to the memo, Attorney General Eric Holder reiterated the point: “It will not be a priority to use federal resources to prosecute patients with serious illnesses or their caregivers who are complying with state laws on medical marijuana.”⁵⁹ The plan, he told reporters in a question and answer session that followed, was “to go after those people who violate both federal and state law.”⁶⁰

54. See Tim Dickinson, *Obama’s War on Pot*, ROLLING STONE (Feb. 16, 2012), available at <http://www.rollingstone.com/politics/news/obamas-war-on-pot-20120216>.

55. *Id.*

56. See Michael Scherer, *What Is President Obama’s Problem with Medical Marijuana?*, TIME (May 3, 2012), <http://swampland.time.com/2012/05/03/what-is-president-obamas-problem-with-medical-marijuana/> (showing support for the use of medical marijuana).

57. Memorandum for Selected United States Attorneys from David W. Ogden, Deputy Attorney General, *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana* (Oct. 19, 2009), available at <http://www.justice.gov/opa/documents/medical-marijuana.pdf>.

58. *Id.*

59. David Stout & Solomon Moore, *U.S. Won’t Prosecute in States That Allow Medical Marijuana*, N.Y. TIMES, Oct. 20, 2009, <http://www.nytimes.com/2009/10/20/us/20cannabis.html>.

60. *AG Signals Shift in Medical Pot Policy*, CBSNEWS.COM, Apr. 8, 2009, http://www.cbsnews.com/2100-503767_162-4875417.html.

In short, federal law was what it was, but enforcing this particular federal law was not a priority given DOJ's limited resources and the myriad other things on its plate. It was not that DOJ was *refusing* to enforce the law because of countervailing state positions and public opinion (as if it could).⁶¹ Nor was it the case that DOJ was telling its attorneys to simply "ignore federal drug laws" as some congressmen claimed.⁶² The point was that DOJ had limited resources and other, more important things to do.⁶³ It *would* do something, but it was too busy.

The story would not be complete without fast forwarding to 2011, when things *really* got interesting. Hardliner Michele Leonhart was confirmed as head of the Drug Enforcement Agency ("DEA"), and shortly thereafter, the agency issued a position paper entitled, "The DEA Position on Marijuana" (with section headings like "The Fallacy of Marijuana for Medicinal Use," one need not read all sixty-three pages to get the gist).⁶⁴ Within months, DOJ wrote another memo to federal prosecutors in medical marijuana states, this time stating, "Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law . . . such persons are subject to federal enforcement action, including potential prosecution."⁶⁵ A series of federal drug raids on state-licensed medical marijuana dispensaries soon followed, along with threats to prosecute those who owned, operated, or otherwise associated with them.⁶⁶

61. See 28 U.S.C. § 547(1) (2012) ("[E]ach United States attorney, within his district, shall[] prosecute for all offenses against the United States . . ."); see also *supra* note 1 (noting executive branch's constitutional duty to "take care that the laws be faithfully executed").

62. See Stout & Moore, *supra* note 59 (noting that Representative Lamar Smith, senior Republican on the House Judiciary Committee, believed DOJ "would weaken federal enforcement of drug laws").

63. See *United States v. Batchelder*, 442 U.S. 114, 126–27 (1979) (recognizing prosecutorial discretion).

64. U.S. DEP'T OF JUSTICE, DEA POSITION ON MARIJUANA (2011), available at http://www.justice.gov/dea/docs/marijuana_position_2011.pdf.

65. Memorandum for United States Attorneys from James M. Cole, Deputy Attorney General, *Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use* (June 29, 2011), available at <http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf>.

66. See Dickinson, *supra* note 54 (discussing federal crackdown and statements by DOJ attorneys that they would "vigorously" enforce the CSA "even if such activities are permitted under state law"); see also William Yardley, *New Federal Crackdown Confounds States That Allow Medical Marijuana*, N.Y. TIMES, May 7, 2011, at A13. Most disturbing are the threats to prosecute the hundreds of state and local employees associated with licensing and regulating state-approved medical marijuana producers. See *infra* note 68.

The state of affairs now is massive confusion. While the Obama Administration maintains that its stance has been “clear and consistent” all along,⁶⁷ White House drug czar Gil Kerikowske has recently acknowledged that the Administration “has not done a particularly good job” of articulating its drug policy,⁶⁸ and legislators on both sides of the aisle have written an open letter calling upon the federal government to provide “clarity rather than chaos.”⁶⁹ For his part, Attorney General Holder clarified DOJ’s position as follows: “If in fact people are not using the policy decision that we have made to use marijuana in a way that’s not consistent with the state statute, we will not use our limited resources in that way.”⁷⁰ Um, yeah, that clears up a lot.

Meanwhile, the uncertainty has started to play out in court. In late 2012, the City of Oakland filed suit against the federal government for seizing an Oakland building occupied by a registered and permitted medical marijuana dispensary,⁷¹ claiming in part that DOJ’s policy statements and prior pattern of nonenforcement against state-authorized dispensaries barred its seizure of the dispensaries under the doctrine of equitable estoppel.⁷² A federal magistrate recently dismissed the suit, but the same arguments are being made in the parallel forfeiture action.⁷³ Meanwhile, over a dozen

67. Dickinson, *supra* note 54.

68. See Carly Schwartz, *Capital City Care, D.C.’s First Medical Marijuana Dispensary, Stated to Open in April*, HUFFINGTON POST (Feb. 15, 2013, 12:25 PM), http://www.huffingtonpost.com/2013/02/15/capital-city-care_n_2696193.html. The issue is about to get *really* interesting, as the District of Columbia’s first medical marijuana dispensary just got its license and is about to be open for business. See Arin Greenwood, *Capital City Care, D.C. Medical Marijuana Dispensary, Receives License*, HUFFINGTON POST (Apr. 23, 2013, 6:19 PM), http://www.huffingtonpost.com/2013/04/23/capital-city-care-dispensary-license_n_3141747.html.

69. Lucia Graves, *Lawmakers in 5 States Tell Feds to Back off Medical Marijuana*, HUFFINGTON POST (Apr. 2, 2012, 4:26 PM), http://www.huffingtonpost.com/2012/04/02/lawmakers-in-5-states-tell-feds-medical-marijuana_n_1397811.html.

70. Scherer, *supra* note 56.

71. See Press Release, Office of the City Attorney, Oakland City Attorney and Morrison & Foerster Sue Federal Government to Prevent Seizure of Building Used by Medical Cannabis Dispensary (Oct. 10, 2012), *available at* <http://www.oaklandcityattorney.org/News/Press%20releases/Fed%20complaint%20med%20cannabis%20Oct%2010%202012.html>; Nicole Flatow, *Oakland Sues Federal Prosecutors over Medical Marijuana Crackdown*, THINK PROGRESS (Oct. 11, 2012), <http://thinkprogress.org/justice/2012/10/11/993261/oakland-sues-federal-prosecutors-over-medical-marijuana-crackdown/?mobile=nc>.

72. Complaint at ¶¶ 1–3, *City of Oakland v. Holder*, No. sf-3201156, (N.D. Cal. Oct. 10, 2012).

73. See *Judge Rules Against Oakland in Medical Marijuana Lawsuit*, L.A. TIMES, Feb. 14, 2013, <http://latimesblogs.latimes.com/lanow/2013/02/judge-rules-against-oakland-in-medical-marijuana-lawsuit.html>.

Congressmen have since weighed in with a proposed federal statute to protect state medical marijuana dispensaries and the patients they serve.⁷⁴

Maybe what we are seeing is passive-aggressive enforcement of an earlier passive-aggressive decision not to enforce. Regardless, DOJ's earlier approach to (non)enforcement of the CSA in the context of medical marijuana exemplifies what we all do when we do not want to do something, but feel pushed to do it anyway—we say we *would* do it, but we are too busy with other more important things to do.

D. Deportation

This next illustration of passive-aggressive executive power could be called deportation or “denying visas”—either way, it exemplifies the “I *would*, but I am not competent” approach to passive-aggressive executive power. To see what I mean, one need only think back to the exclusion of homosexuals from the United States in the 1970s, and how a different government posture came to be.⁷⁵

Back in the 1950s and 1960s, Section 212 of the Immigration and Nationality Act defined the class of aliens who were inadmissible to the United States as including “[a]liens afflicted with psychopathic personality, sexual deviation, or a mental defect.”⁷⁶ In 1967, the Supreme Court construed the phrase “psychopathic personality” in Section 212 to include homosexuals.⁷⁷ Throughout most of the 1970s, the Immigration Naturalization Service (“INS”) enforced Section 212 by referring suspected homosexuals to an on-staff Public Health Service (“PHS”) official for a medical examination.⁷⁸ The INS's position was that a PHS medical certification was necessary because the determination of homosexuality was a matter beyond its expertise.⁷⁹

In 1979, the INS medical referral system came to an abrupt halt when the Surgeon General of the United States issued a policy memorandum stating that PHS medical officers would no longer certify homosexuality as

74. *Id.*

75. I credit Peter Shane, with sincere thanks, for this wonderful contribution at the Schmooze.

76. 8 U.S.C. § 1182(a)(4) (1970).

77. *Boutilier v. INS*, 387 U.S. 118, 120 (1967) (“The legislative history of the Act indicates beyond a shadow of a doubt that the Congress intended the phrase ‘psychopathic personality’ to include homosexuals such as petitioner.”).

78. *Hill v. INS*, 714 F.2d 1470, 1472 (1983).

79. *Id.* at 1477–78 (reviewing INS's rationale for requiring medical certification).

a mental disease or defect per se.⁸⁰ According to the memo, the policy change was made for two reasons. First, the American Psychiatric Association's DSM II and forthcoming DSM III (Diagnostic and Statistical Manual of Mental Disorders) no longer included homosexuality as a psychiatric disorder.⁸¹ Second, homosexuality was not a determination that could be made by a routine medical exam.⁸² The Surgeon General's position was that just as INS had declared itself not competent to make determinations of homosexuality, the PHS was not competent either.⁸³

With no one claiming the competency to make a determination of homosexuality, Section 212's bar against homosexual aliens eventually took care of itself. The INS first allowed suspected homosexuals to enter the United States conditionally, deferring action on their case for the duration of their visit⁸⁴ (which, by the way, presents another nice example of the "do nothing, and hope nobody notices" approach discussed above).⁸⁵ The INS then adopted a "don't ask, don't tell" policy that essentially ignored the prohibition entirely unless an alien made an unambiguous admission of homosexuality on his or her own.⁸⁶ When that eventuality finally occurred, the Ninth Circuit Court of Appeals ruled that INS was unable to enforce Section 212 given the certification procedure on the books.⁸⁷ In the concluding lines of its opinion, the court wrote:

Because the PHS refuses to issue medical certificates on the basis of homosexuality per se and because we today hold that the INS may not exclude homosexual aliens without such certificates, it is completely speculative that any aliens will be excluded in the future on the basis of their homosexuality per se.⁸⁸

And with that, the provision was declared dead.

80. *Id.* at 1472.

81. *Id.* at 1472 n.3 (citation omitted).

82. *Id.* at 1473 (citation omitted).

83. *See id.* at 1472-73.

84. *Id.* at 1473; Philip J. Hiltz, *Agency to Use Dormant Law to Bar Homosexuals from U.S.*, N.Y. TIMES, June 3, 1990, <http://www.nytimes.com/1990/06/03/us/agency-to-use-dormant-law-to-bar-homosexuals-from-us.html> ("When people declare themselves homosexual, an immigration service official who spoke on the condition of anonymity said, the service simply defers action on the case for the duration of the person's visit.").

85. *See supra* Part I.A.

86. *See Hill*, 714 F.2d at 1473.

87. *Id.* at 1481.

88. *Id.*

Eventually, Section 212 was amended to formally end the exclusion of suspected homosexuals on that basis (although not until 1990).⁸⁹ Yet even while it was valid, both the INS and PHS rendered Section 212 a nullity by taking the same approach to its dictates—“I *would*, but I’m not competent. You will need to get somebody else.”

E. DOMA

The Obama Administration’s stance on the now invalid Section 3 of the Defense of Marriage Act (“DOMA”)⁹⁰ is such a clear-cut example of passive-aggressive executive power that I can get right to the point. Section 3 of DOMA codified the definition of marriage for all federal purposes as “only a legal union between one man and one woman as husband and wife.”⁹¹ Thus, same-sex couples were not eligible for a host of federal benefits, such as filing joint tax returns, collecting Social Security survivors’ benefits, and qualifying for insurance coverage as the spouse of a government employee.⁹²

President Obama had long opposed DOMA in principle, and in February 2011, Attorney General Eric Holder sent a letter to Congress stating that both he and the President had concluded that Section 3 violated the Equal Protection Clause of the Fifth Amendment.⁹³ As such, the letter explained, the executive branch would no longer defend DOMA in cases where its constitutionality was being decided against a blank slate (although it would continue to defend the statute in other cases and, in any event, would continue to enforce its provisions until Congress repealed them or the judicial branch ruled them invalid).⁹⁴ Attorney General Holder also pledged to “notify the courts of our interest in providing Congress a full and

89. 8 U.S.C. § 1182 (1990).

90. See *United States v. Windsor*, 133 S. Ct. 2675, 2684–96 (2013) (holding that DOMA’s definition of marriage was unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment).

91. 1 U.S.C. § 7 (2012).

92. See *An Overview of Federal Rights and Protections Granted to Married Couples*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/an-overview-of-federal-rights-and-protections-granted-to-married-couples> (last visited Sept. 29, 2013).

93. See Daniel Foster, *Obama Administration Declares DOMA Unconstitutional, Won’t Defend It in Court* (Feb. 23, 2011), <http://www.nationalreview.com/corner/260494/breaking-obama-administration-declares-doma-unconstitutional-wont-defend-it-court-dani> (reproducing letter to Congress).

94. See *id.* (noting that where courts apply rational basis review, “the Department will state that, consistent with the position it has taken in prior cases, a reasonable argument for Section 3’s constitutionality may be proffered under that permissive standard”).

fair opportunity to participate in the litigation in those cases,”⁹⁵ and indeed, House Republicans hired a lawyer to defend the moribund statute on their own.⁹⁶

In a roundtable discussion with reporters, President Obama explained the rationale behind his approach, stating:

Administratively, we can’t ignore the law. DOMA is still on the books. What we have said is even as we enforce it, we don’t support it, we think it’s unconstitutional. The position that my administration has taken I think will have a significant influence on the court as it examines the constitutionality of this law.⁹⁷

As the nation’s chief executive, President Obama felt that he had to enforce DOMA. But he clearly did not *want* to, and he did not see his obligation as defending the law as well (at least when he thought it to be unconstitutional). Indeed, President Obama explicitly recognized his refusal to defend DOMA as a way to undermine it—a way to signal to courts in no uncertain terms just how indefensible the Administration thought the law was.⁹⁸ Critics called the move “an executive power grab,”⁹⁹ but there is another (and in my mind better) name for the approach President Obama took: passive-aggressive executive power.

II. EVALUATING PASSIVE-AGGRESSIVE EXECUTIVE POWER

One might evaluate executive power from a number of different vantage points, and plenty of law review articles have.¹⁰⁰ The focus of my discussion, however, has been passive-aggressive executive power, so that is the evaluative lens I use here. Assuming, again, that executive power to enforce the law includes the duty to use it (so the “Just say no” option is not

95. Foster, *supra* note 93.

96. See Bill Mears, *Boehner Hires Top Lawyer to Fight over Marriage Law*, *Sources Say*, CNN.COM, Apr. 19, 2011, <http://www.cnn.com/2011/POLITICS/04/18/house.defense.of.marriage/index.html?iref=allsearch>.

97. Press Release, The White House: Office of the Press Secretary, Remarks by the President in an “Open for Questions” Roundtable (Sept. 28, 2011), <http://www.whitehouse.gov/the-press-office/2011/09/28/remarks-president-open-questions-roundtable>.

98. *Id.*

99. Devin Dwyer, *Critics Call Obama DOMA Decision an Executive Power Grab*, ABC NEWS.COM, Feb. 24, 2011, <http://abcnews.go.com/Politics/critics-slam-obama-doma-decision-newt-gingrich-calls/story?id=12992207>.

100. See, e.g., Aziz Z. Huq, *Enforcing (but Not Defending) ‘Unconstitutional’ Laws*, 98 VA. L. REV. 1001, 1009–11 (2012) (analyzing ‘enforce but do not defend’ using a “consequentialist analysis in light of the full spectrum of constitutional values”); Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183 (2012) (analyzing ‘enforce but do not defend’ using a range of considerations deemed relevant to the analysis).

on the table), how do the passive-aggressive responses discussed above compare?

I start the discussion with a thought experiment: rather than talking about executive power, what insights might we glean if we couched the discussion in terms of a reasonably prudent thirteen-year-old instead? Executive power is complicated, but passive-aggressive responses exist in some pretty simple forms, and kids are a nice example. Parents impose upon their children all sorts of obligations to do things that their children would prefer not to do.¹⁰¹ For the most part (and assuming away the terrible twos), our children do not come right out and say “no” to those directives. They do other things—passive-aggressive things—instead, and they have those responses down pat by the time they are in their early teens. So applying the standard of a reasonably prudent thirteen-year-old, how do the responses I have discussed above fare?

First consider the “*do nothing, and hope nobody notices*” response.¹⁰² What parent on this planet is okay with that? None that I know, and the reason is not so much that the behavior is passive-aggressive, but rather because there is a good chance it would work (that is, nobody would notice—that is, until disaster struck). Parents are busy people. We simply don’t have time to monitor every move our thirteen-year-olds make. That is why when we tell them to do something, we have to have some modicum of trust that they will actually do it, if only so that we can get on with the myriad of other things competing for our precious time.

Second, what about the “*do something silly*” response, the one that makes a mockery of the entire enterprise?¹⁰³ This one is no better, and in many ways worse. It is the one response that infuriates us as parents because it is all about flouting our power. This one *feels* disrespectful because it *is* disrespectful, and nobody likes being disrespected—least of all, parents.

Third is the “*I would, but I’m too busy*” response—the blow-off.¹⁰⁴ When it is a legitimate excuse (for example, a school project is due), then we understand, we bend. But when what is really going on is passive-aggressive behavior, then our response tends to be more along the lines of “Busy? I’ll show you busy” (sometimes accompanied by “and don’t you

101. The analogy is not perfect, but it captures the obligation to enforce better than most other relationships I know. *Sometimes* I can get my husband to do what I say, but not if I tell him he *has to* do what I say.

102. *See supra* Part I.A.

103. *See supra* Part I.B.

104. *See supra* Part I.C.

give me that look”). Here again, the response feels disrespectful because it *is* disrespectful—and when it comes to the blow-off, there is another danger as well. In the parenting world, consistency is everything. The response we get depends on the signals we send, and if we sometimes demand that our child do a particular task and at other times don’t, our reasonably prudent thirteen-year-old will get the signal that the task is not all *that* important. We cannot get mad at our hypothetical thirteen-year-old for not emptying the dishwasher when we have been inconsistent about insisting that she do it in the past.

Fourth, the closely related “*I would, but I am not competent*” response¹⁰⁵ is an empirically proven husband avoidance technique (particularly in the realm of laundry and dishes), but one can imagine our reasonably prudent thirteen-year-old being a quick study and trying it out as well. Here we are dealing with a possible blow-off and a moral hazard problem as well—why learn how to perform certain tasks when not knowing how to perform them is the ticket out? This one is no better than the rest, and given the adverse incentives in play, it may be worse.

That leaves only the “*Fine I’ll do it but let’s be clear, I don’t want to*” response—and now we are on to something.¹⁰⁶ This approach is the one we parents do not mind. After all, how many times have we praised our kids for “using their words” rather than acting out? In the grand scheme of things, I cannot make my thirteen-year-old want to do what I have told her to do. But if her resistance takes the form of “Fine, I’ll do it, but for the record, I don’t want to,” that is about as good as it is going to get. It respects my authority. It allows for self-expression. And it paves the way for dialogue rather than ignorance, confusion, or anger—which is what I am left with as a result of the other passive-aggressive responses. For the record, that is an incredibly mature thing for a thirteen-year-old (even a reasonably prudent one) to do.

Turning now to the realm of executive power, I submit that the institutional considerations one might employ to evaluate the various passive-aggressive responses to enforcement obligations are not so different from these. We do not want the executive branch to do nothing and hope nobody notices. People are busy living their lives; they do not have time to enforce the enforcers. We also do not want executive power being used in ways that make a mockery of our laws. The thumb-your-nose response to enforcement obligations is not exactly a healthy way of managing inter-branch conflict or complex institutional dynamics. The “I would, but I’m

105. See *supra* Part I.D.

106. See *supra* Part I.E.

too busy” blow-off is not much better, and in some ways is worse. It not only shirks executive branch duties, but also sends inconsistent signals about where, when, and how laws will be enforced—with unfair results, as the medical marijuana context amply shows. And the “I would, but I am not competent” response is deeply problematic for all the same reasons, and comes with a moral hazard problem to boot.

Only the last strand of passive-aggressive executive power—the “I’ll do it but I do not want to” response—presents an arguably acceptable approach to unwanted executive power. It does not shirk enforcement obligations, but it does let the other branches know exactly where the executive stands. It is the executive branch “using its words,” paving the way for an inter-branch dialogue that might just obviate the need for further displays of passive-aggressive executive power. And for the record, that is an incredibly mature thing for an executive branch (even a reasonably prudent one) to do.